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ARIZONA ATTORNEY GENERAL**

April 29, 1952
Opinion No. 52-123

Mr. M. V. Gibbons
County Attorney
Apache County Courthouse
St. Johns, Arizona

Dear Mr. Gibbons:

We have received a request for an opinion from Mrs. Pearl Herrell, P. O. Box 283, McNary, Arizona, concerning the Teachers' Retirement Act.

It is not generally our policy to answer requests from private parties without verification from the county attorney concerned but because of the need for immediate action by Mrs. Herrell if she is to receive benefits under the law as it presently exists, we have taken the liberty of answering her request and respectfully request that you pass on the information to her.

The fact situation as presented by Mrs. Herrell is as follows:

Under the Teachers' Retirement Act as it presently exists, she is eligible to retire as provided by Section 54-1707, ACA 1939.

The Twentieth Legislature has amended this section, raising the retirement age to 65 from 60, thus making her ineligible to retire if she is to be bound by the amendment to this section. The amendment will become effective on or about June 25, 1952.

Section 54-1707, ACA 1939 presently reads as follows (so far as material herein):

"(a) Any member in service, who desires to retire for service, shall file a written application with the board of trustees, setting forth the date, not less than thirty (30) nor more than ninety (90) days thereafter on which he desires to be retired. If he has attained

Mr. M. V. Gibbons
Apache County Attorney
St. Johns, Arizona

April 29, 1952
Opinion No. 52-123
Page two

the age of sixty (60) prior to the date specified, he shall be retired, whether or not he separates from service during the period of notification. * * * (Emphasis supplied)

It is our understanding that regardless of the date of application or retirement date specified by the applicant, the Retirement Board's policy is not to retire an applicant prior to July 1st of any year. Such action in the case of Mrs. Herrell would have the effect of bringing her under the new amendment thus making her ineligible to retire until age 65. She is presently 63 years old.

It is to be noticed that the pertinent portion of the Act reads:

"If he has attained the age of sixty prior to the date specified, he shall be retired."

We are of the opinion that an applicant who meets all other necessary qualifications making application to retire on a date prior to the effective date of the new amendment and said date being not less than 30 nor more than 90 days after the date of application, the Board must retire the applicant on the specified date and has no power to delay the date to July 1st or any other date.

To give any other effect to Section 54-1707 would require construing the word "shall" to be permissive and not mandatory. On this subject, the law is clear. The great majority of courts have ruled that the word "shall" when used in statutes is mandatory unless something in the Act requires a different meaning. In Jersey City v. Dept. of Civil Service, 76 A. 2d 830, the Court said:

"The presumption is that the word 'shall' in a statute is used in an imperative and not a directory sense, and if a different interpretation is sought, it must rest on something in the character of the legislation or in the context which will justify a different meaning."

Mr. M. V. Gibbons
Apache County Attorney
St. Johns, Arizona

April 29, 1952
Opinion No. 52-123
Page three

The word "imperative" is defined in Webster's Dictionary as follows:

"expressing positive command; authoritative; peremptory; not to be avoided or shirked; urgent; compulsory; * * *"

See Words and Phrases Perm. Ed. for other cases holding that the word "shall" when used in statutes is generally presumed to be mandatory.

We have examined the Teachers' Retirement Act closely but fail to find any reason why the normal meaning should not be applied in this instance.

It is therefore our opinion that if Mrs. Herrell applies within the proper dates and specifies a date prior to the effective date of the amendment to the Teachers' Retirement Act, she is entitled to be retired under the Act as it reads today.

Sincerely,

FRED O. WILSON
Attorney General

ALFRED C. MARQUEZ
Assistant Attorney General

ACM:d